Supreme Court, U.S.
FILED
MAR 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1437

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

HENRIETTA K. THOMAS, Petitioner,

v.

BOARD OF EXAMINERS, Chicago Public Schools, et al.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Henrietta K. Thomas, Pro Se
401 East 32nd Street, #1804
Chicago, Illinois 60616-4029
Home Phone: 312/842-6239
Work Phone: 312/332-2777

QUESTIONS PRESENTED FOR REVIEW

1. What is the nature of the interest at stake when a local governmental agency denies an application for a school principal's certificate without affording the applicant (a) a fair and impartial hearing in a required oral interview, (b) the right to appeal the adverse outcome of the oral interview, or in the alternative, (c) an opportunity to apply for a second oral interview?

2. Whether a post-deprivation remedy of an opportunity to reapply for a principal's certificate at some indefinite later date satisfies the requirements of due process?

3. Whether the Court of Appeals followed proper procedure in reviewing the Fed. R. Civ. P. Rule 12(b)(6) dismissal of the instant case?

4. Whether intervening legislation abolishing the local governmental agency referred to in (1) above renders moot the instant case?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Parties to the proceeding in the United States Court of Appeals were:

Henrietta K. Thomas, Plaintiff-Appellant.

Board of Examiners, Chicago Public Schools, and Board of Education of the City of Chicago, Defendants-Appellees.

TABLE OF CONTENTS

REFERENCE TO OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF MATERIAL FACTS 6

Background Information 7

Summary of Petitioner's Claim 8

The Rulings Below 11

REASONS FOR GRANTING THE WRIT 15

I. Certiorari Should Be Granted to Resolve the Disagreement Between the Courts Below as to the Nature of the Interest at Stake. 15

II. Certiorari Should Be Granted to Determine the Process Due. 16

III. Certiorari Should Be Granted to Determine if the Court of Appeals Followed Proper Procedure in Reviewing this Case. 19

IV. Certiorari Should Be Granted to Decide Questions of Mootness. 23

CONCLUSION 28

AFFIDAVIT OF SERVICE 29

TABLE OF AUTHORITIES

Appley v. West, 832 F.2d 1021 (7th Cir. 1987) 20

Bigby v. City of Chicago, 766 F.2d 1053 (7th Cir. 1985), *cert. denied sub nom. Thoele v. Chicago*, 474 U.S. 1056 (1986) 11

Board of Regents v. Roth, 408 U.S. 564 (1972) 15, 17

Brewer v. Wegmann, 691 F.2d 216 (5th Cir. 1982) (per curiam), *cert. denied*, 461 U.S. 908 (1983) 12

Conley v. Gibson, 355 U.S. 41 (1957) 20

Dandridge v. Williams, 397 U.S. 471 (1970) 12

Freitag v. Carter, 489 F.2d 1377 (7th Cir. 1973) 19

Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926) 16, 17

Gomez v. Illinois State Board of Education, 811 F.2d 1030 (7th Cir. 1987) 21

Haines v. Kerner, 404 U.S. 519 (1973) 20

Hall v. City of Santa Barbaraa, 833 F.2d 1270 (9th Cir. 1986) 19

Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621 (9th Cir. 1988) 20

Mahone v. Addicks Utility District of Harris County, 836 F.2d 921 (5th Cir. 1988) 19
Martin-Trigona v. Stewart, 691 F.2d 856 (8th Cir. 1982) 20
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 12
Southern Pacific Terminal Co. v. Interstate Commerce Commission 219 U.S. 498 (1911) 26
Thomas v. Board of Examiners, 651 F.Supp. 664 (N.D. Ill. 1986) 11, 12, 14, 15, 16, 18
Thomas v. Board of Examiners, No. 87-1086, slip op. (7th Cir. Jan. 11, 1989) 14, 15, 16, 22
Webster v. Redmond, 599 F.2d 793 (7th Cir. 1979), *cert. denied*, 444 U.S. 1039 (1980) 21-22
Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963)..... 12, 16-17, 18
Wilson v. Civil Town of Clayton, Indiana, 839 F.2d 375 (7th Cir. 1988) 20
Zynn v. O'Donnell, 688 F.2d 940 (3rd Cir. 1982) 20

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution

Fourteenth Amendment 3

Federal Statutes

42 U.S.C. § 1983 3-4

State Statutes

ILL. REV. STAT. ch. 24, para. 10-1-17 (1985) 5, 7
ILL. REV. STAT. ch. 122, para. 21-1 (1985)..... 5, 7
ILL. REV. STAT. ch. 122, para. 34-8.1 (1985) 5, 7, 24
ILL. REV. STAT. ch. 122, para. 34-83 (1985) 5, 7
1985 ILL. LAWS, P.A. 84-126, Sec. 21-1 ..... 5, 8
1985 ILL. LAWS, P.A. 84-126, Sec. 21-1a 5, 8
1985 ILL. LAWS, P.A. 84-126, Sec. 34-8.1 ..... 5, 8, 24
1985 ILL. LAWS, P.A. 84-126, Sec. 34-83 ..... 5, 8

Local Rules and Regulations

Circular of Information/Chicago Public Schools 4

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

HENRIETTA K. THOMAS, Petitioner,

v.

BOARD OF EXAMINERS, Chicago Public Schools, et al.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Henrietta K. Thomas, acting pro se, respectfully prays that a writ of certiorari issue to review the judgment of The United States Court of Appeals for the Seventh Circuit entered in this matter on September 12, 1988, and the order appended thereto which was released as an opinion of that court on January 11, 1989.

REFERENCE TO OPINIONS BELOW

The January 11, 1989 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, has not as yet been reported, but is reproduced in the separate Appendix to this petition at pp. 1-7. (The Court of Appeals' original unpublished order was reported at 860 F.2d 1082.) The prior memorandum opinion and order of The United States District Court for the Northern District of Illinois, Eastern Division, was reported at 651 F.Supp. 664 (N.D. Ill. 1986), and is reproduced in the Appendix at pp. 8-30.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1988. A timely petition for rehearing was denied on November 4, 1988. On January 25, 1989, Justice John Paul Stevens entered an order extending the time for the filing of this petition to and including March 2, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also involved is an Act of Congress, 42 U.S.C. § 1983, which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action

at law, suit in equity, or other proper proceeding for redress.

The local governmental regulation originally sought to be enjoined is contained in a "Circular of Information" on certification requirements and procedures published by the Chicago public school system in 1982 and 1984, and reads in pertinent part as follows:

> Results of oral examinations will be reported to the candidate as "recommended" or "not recommended." Only candidates who have been recommended by the oral committee will be considered for certification. ORAL EXAMINATIONS ARE NOT SUBJECT TO REVIEW. Teachers who are not recommended in the oral examinations may apply for a second oral examination after a waiting period of six months but no longer than one year after the date of the original oral examination.
>
> This provision for a second oral does not apply to examination of principal.

Several provisions of Illinois law are relevant to this case, but because the text is rather lengthy, and because it is necessary to an understanding of the case to compare present and past law, these provisions are reproduced in the separate Appendix to this petition at pp. 33-43. They are:

ILL. REV. STAT. ch. 122, para. 21-1 (1985) (5th paragraph);

ILL. REV. STAT. ch. 122, para. 34-8.1 (1985);

ILL. REV. STAT. ch. 122, para. 34-83 (1985);

1985 ILLINOIS LAWS, PUBLIC ACT 84-126, Section 21-1 (5th paragraph);

1985 ILLINOIS LAWS, PUBLIC ACT 84-126, Section 34-8.1;

1985 ILLINOIS LAWS, PUBLIC ACT 84-126, Section 21-1a;

1985 ILLINOIS LAWS, PUBLIC ACT 84-126, Section 34-83;

ILL. REV. STAT. ch. 24, para. 10-1-17 (1985).

STATEMENT OF MATERIAL FACTS

This is a Fourteenth Amendment civil rights action brought in the United States District Court for the Northern District of Illinois, Eastern Division, on November 14, 1985, pursuant to 42 U.S.C. § 1983 under jurisdiction of 28 U.S.C. § 1331(a), 1343(3), and 1343(4), to challenge the constitutionality of certain rules and regulations governing the certification of principals by the Chicago public school system. Both the original complaint and an amended complaint filed on May 15, 1986 sought declaratory, injunctive, and equitable relief plus damages against the Board of Examiners, Chicago Public Schools, and the Board of Education of the City of Chicago for violating petitioner's Fourteenth Amendment due process and equal protection rights when they denied her a principal's certificate in 1983 without affording her (a) a fair and impartial hearing in a required oral interview, (b) an opportunity to appeal the adverse outcome of the oral interview, or in the alternative, (c) the same opportunity to apply for a second oral interview as was offered to applicants for teacher's certificates.

Background Information

The State of Illinois has, for many years, had a dual certification system for public school teachers and administrators. Those who wanted to work outside the City of Chicago had to have state certificates issued pursuant to Article 21, Sections 21-2 to 21-24 of the Illinois School Code, while those who wanted to work in the Chicago public school system had to obtain certificates from the Chicago Board of Education. See ILL. REV. STAT. ch. 122, para. 21-1 (1985) (5th paragraph), App. at 33.

Certificated school personnel are exempt from the civil service law in Illinois. ILL. REV. STAT. ch. 24, para. 10-1-17 (1985), App. at 42-43.

The Chicago Board's authority to issue teaching and administrative certificates is found at Sections 34-83 and 34-8.1 of the Illinois School Code, see ILL. REV. STAT. ch. 122, para. 34-83 and 34-8.1 (1985), App. at 33-35, and the Board of Examiners, originally established by the Illinois General Assembly in 1917, has traditionally conducted the examinations for both types of certificates.

The Board of Examiners was abolished by the Illinois General Assembly effective July 1, 1988. 1985 ILL. LAWS, P.A. 84-126, Sec. 34-83, App. at 40-42. Now, all prospective Chicago public school teachers and administrators are required to hold state certificates. 1985 ILL. LAWS, P.A. 84-126, Sec. 21-1, 21-1a, App. at 35-36, 37-40. But the Chicago Board of Education is still authorized to issue administrative certificates to holders of state certificates who want to work in the Chicago public school system. 1985 ILL. LAWS, P.A. 84-126, Sec. 34-8.1, App. at 36-37. These changes in the law were not before either of the courts below because petitioner was not aware of their existence until after the Board of Examiners held its final principal's certificate examination shortly before July 1, 1988. (Petitioner did not take part in that examination because she didn't know it had been scheduled.) They are reported here because they raise questions of mootness which may affect the outcome of this case.

Summary of Petitioner's Claim

On January 6, 1983, petitioner applied for a Chicago principal's certificate and paid the

required $50.00 examination fee. To obtain the certificate, she had to pass both a written examination and an oral interview. Petitioner passed the written examination at the 99th percentile, but failed the oral interview and was not certified.

At her oral interview on August 12, 1983, petitioner was asked to respond to three problem situations—a teacher with a "suspicious" attendance record, an administrative assignment to a "bad" high school, and a parental complaint of teacher brutality. On the first and last of these questions, one of the interviewers—Mrs. Josephine C. Logan-Woods, a Chicago public school principal—repeatedly interrupted petitioner's responses with rapid-fire barrages of repetitive, irrelevant questions such as "What if he says it's legitimate? What if he says it's legitimate? What if he says it's legitimate?" and "What if he denies it? What if he denies it? What if he denies it?" which effectively prevented petitioner from completing her responses to the problem situation(s). The other members of the interview panel—Dr. Joseph W. Lee, a District Superintendent, and a Mr. Walker, whose identity is unknown to petitioner—

made no effort to curtail this type of questioning, although Dr. Lee did appear to "rescue" petitioner from further onslaught at one point. Petitioner had no opportunity to express her objections to this type of questioning because (a) Mrs. Logan-Woods abruptly terminated the interview before petitioner had finished her closing remarks, and (b) all candidates were required to leave the building immediately after their interviews.

On August 26, 1983, Dr. Morton L. Elenbogen, vice-chairman of the Board of Examiners, presented a list of 168 "recommended" candidates to the Board of Education for approval. Petitioner was not among those recommended for certification.

On September 3, 1983, petitioner met with Dr. Elenbogen to discuss the oral interview. She was advised that she had failed the oral interview because her responses to the first and third questions were "not acceptable" to the oral interview committee. Dr. Elenbogen declined to give petitioner any further information as to the reasons for denial. When petitioner asked about appeal rights, Dr. Elenbogen advised her that, under the Board's rules, (a) oral examinations are not subject to

review, and (b) applicants for principal's certificates are not allowed to apply for second orals.

Petitioner made no further effort to obtain review of the denial of her application for a Chicago principal's certificate, but subsequently filed suit in the United States District Court alleging that the policies and procedures governing the certification of prospective Chicago public school principals deprived her of her Fourteenth Amendment due process and equal protection rights.

See amended complaint, App. at 44-55.

The Rulings Below

The district court construed the amended complaint as alleging a denial of occupational liberty, *Thomas v. Board of Examiners,* 651 F.Supp. 664, 668 (N.D. Ill. 1986), App. at 17-18, but decided that petitioner was not denied due process because:

(a) following *Bigby v. City of Chicago*, 766 F.2d 1053 (7th Cir. 1985), *cert. denied sub nom. Thoele v. Chicago*, 474 U.S. 1056, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986), petitioner was not entitled to a "fair" examination, 651 F.Supp. at 670, App. at 23-25, and

(b) following *Brewer v. Wegmann*, 691 F.2d 216 (5th Cir. 1982) (per curiam), *cert. denied*, 461 U.S. 908, 103 S.Ct. 1881, 76 L.Ed.2d 811 (1983), petitioner is not denied due process so long as she "is not foreclosed from reentering the process for obtaining a principal's certificate." 651 F.Supp. at 670-71, App. at 25-27.

The district court further stated that petitioner could not state a claim under either *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963), or *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), because (a) "there were no adverse charges or accusations of any kind made against her," 651 F.Supp. at 668-69, App. at 19-20, and (b) the petitioner "makes no claim that the reasons or evidence defendants relied upon were not rationally related to the standards of fitness and competence that the defendants may require of principals." 651 F.Supp. at 669, App. at 20-21.

As to the equal protection claim, the district court applied the rational basis test outlined in *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), and concluded that there was a rational basis for

the differential treatment of prospective Chicago public school teachers and principals in regard to the oral examination.

First, the duties of a principal are different from and may be considered weightier than those of a teacher. There is increased responsibility over students, other teachers, and administration. See Ill. Rev. Stat. ch. 122, ¶¶34-8.1 and 21-1a. Moreover, in many cases an applicant for a regular teaching certificate who fails the oral examination may still teach in a classroom on a provisional certificate. See Ill. Rev. Stat. ch. 122, ¶21-1, 21-10. Such a person may continue to grow professionally, even after failing an oral examination. It is therefore rational for defendants, who are interested in quality teachers, to allow unsuccessful teacher applicants to reapply for an oral examination (without having to retake and pass the written test) after a period of six months from the initial failure. By contrast, an unsuccessful candidate for a principal's certificate may not provisionally supervise a school in Chicago, there being no authority for the provisional certification of principals. It is therefore rational for defendants to require that principal applicants, who seek jobs of relatively weightier responsibility, be put to a greater task before they may be orally examined a second time. That is, they must

> demonstrate that they are still competent on the written examination before they are granted (i.e., invited to) another oral examination. Thus, because the differential treatment of teacher and principal applicants bears a rational relation to the legitimate state interest in obtaining quality members of the school work force, plaintiff's equal protection claim must fail.

Thomas, 651 F.Supp. at 671-672, App. at 28-29.

The Court of Appeals apparently agreed with the district court's analysis of the equal protection claim. *Thomas v. Board of Examiners*, No. 87-1086, slip op. at 4-5 (7th Cir. Jan. 11, 1989), App. at 7 ("we do not find the groups to be so similar as to require identical treatment."). But it affirmed the dismissal of the due process claim on entirely different grounds—that, following *Bigby, supra*, "the denial of a promotion within a given occupation does not infringe liberty of occupation[.]" *Id.*, slip op. at 4, App. at 6.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Resolve the Disagreement Between the Courts Below as to the Nature of the Interest at Stake.

This Court said, in *Board of Regents v. Roth*, 408 U.S. 564, 571, 92 S.Ct. 2701, 33 L.Ed.2d 548, 557 (1972), that "the *nature* of the interest at stake" (emphasis in original) determines whether due process applies in a given case.

In applying this principle of law, the courts below arrived at two different, mutually exclusive, determinations. The district court said that petitioner had been deprived of occupational liberty, 651 F.Supp. at 668, App. at 17-18, but the Court of Appeals said she had been denied an opportunity for a promotion. *Thomas*, slip op. at 4, App. at 5-6.

Both courts cannot be correct. A complaint which fairly alleges a deprivation of occupational liberty cannot, at the same time, fairly allege a denial of a promotion.

The Court of Appeals attempted to resolve this by stating that the district court merely

assumed the existence of a liberty interest, *Id.*, slip op. at 3, App. at 4, but the district court's statement was quite clear:

> Since defendants here are able to prevent plaintiff from becoming a principal by denying her a principal's certificate, they are denying plaintiff her liberty interest in her occupational pursuit of becoming a principal.

Thomas, 651 F.Supp. at 668, App. at 18. This was not an assumption; it was a statement of fact based on Illinois law, the allegations of the amended complaint, and occupational licensing case law. And it should have been affirmed by the Court of Appeals.

II.

Certiorari Should Be Granted to Determine the Process Due.

The district court faulted the petitioner for "[failing] to delineate what sort of process is due in a case like the instant one." *Thomas*, 651 F.Supp. at 668, App. at 19. Petitioner thought the process due was obvious from this Court's decisions in *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494 (1926), *Willner v. Com-*

mittee on Character & Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963), and *Board of Regents v. Roth, supra.*

> [Petitioner] should not have been rejected upon charges of his unfitness without giving him an opportunity by notice for hearing and answer. The rules adopted by the board provide that "the board may in its discretion deny admission, suspend or disbar any person." But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process.

Goldsmith, 270 U.S. at 123.

> Petitioner was clearly entitled to notice of and a hearing on the grounds for his rejection either before the Committee or before the Appellate Division.

Willner, 373 U.S. at 105 (citing *Goldsmith, supra*).

> When protected interests are implicated, the right to *some kind of prior hearing* is paramount.

Roth, 408 U.S. at 570. (emphasis added).

But petitioner here did not have any kind of notice or hearing before her application was denied. The district court agreed that the

petitioner had been deprived of occupational liberty, but then said that's okay, you don't need a pre-deprivation remedy because you have a post-deprivation remedy—you can retake the written examination later on, and if you do well, you will be invited to another oral interview, and this will give you another chance to prove your qualifications. *Thomas*, 651 F.Supp at 670-671, App. at 25-27. This is not due process, but an invitation to the petitioner to spend the rest of her professional life applying and reapplying for a Chicago principal's certificate in the hope of someday meeting an oral interview committee which will give her a fair hearing, thereby running the risk of being denied over and over again, and never knowing why she was rejected. This is exactly what happened to Willner when he applied for admission to the New York bar. See *Willner*, 373 U.S. at 100-102. And this Court, upon reviewing his case, agreed that he had been denied procedural due process. *Id.*, at 104-106.

Petitioner believes that (a) the district court erred in its determination of the process due, and (b) the Court of Appeals should have remanded for a proper determination in light

of *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973), where the district court declared Chicago's Public Chauffer's Licensing Ordinance unconstitutional because "it does not provide for adequate notice and hearing procedures in the event of disapproval of an application for a chauffer's license[,]" *id.* at 1383, and a Seventh Circuit Court of Appeals, relying on *Willner, Schware*, and *Goldsmith, supra*, flatly stated:

> A governmental licensing board which judges the fitness of an applicant must afford that applicant adequate notice and a hearing.

Freitag, 489 F.2d at 1382.

III.

Certiorari Should Be Granted to Determine if the Court of Appeals Followed Proper Procedure in Reviewing this Case.

Motions to dismiss for failure to state a claim are disfavored in the law. *Mahone v. Addicks Utility District of Harris County*, 836 F.2d 921, 926 (5th Cir. 1988); *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir.

1986). This Court has made it clear, in particular, that *pro se* litigants are entitled to the benefit of a doubt in the construction of pleadings, *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652, 654 (1973), and that dismissals should not be granted or affirmed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957). These are the rules in the Seventh Circuit. *Wilson v. Civil Town of Clayton, Indiana*, 839 F.2d 375, 378 (7th Cir. 1988). And in other circuits as well. *See, e.g., Zynn v. O'Donnell*, 688 F.2d 940, 941 (3rd Cir. 1982); *Martin-Trigona v. Stewart*, 691 F.2d 856, 858 (8th Cir. 1982); *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988). But petitioner has no way of knowing whether the rules were applied in her case.

The usual procedure, on reviewing a Rule 12(b)(6) dismissal, is for the Court of Appeals to conduct a *de novo* review of the complaint. *Appley v. West*, 832 F.2d 1021, 1030 (7th Cir. 1987). The reason for the dismissal must clearly appear on the face of the complaint.

Gomez v. Illinois State Board of Education, 811 F.2d 1030, 1039 (7th Cir. 1987). Yet here, the Court of Appeals makes no mention of the allegations of petitioner's amended complaint. It decided that a "promotion" was at issue here rather than an occupational license, but does not tell its readers how it came to that conclusion, or why it could not endorse the district court's finding that petitioner had been deprived of occupational liberty.

The word "promotion" appears only once in petitioner's amended complaint, at paragraph 10, in a citation to Illinois law:

> Article 34, Section 84 of The School Code of Illinois requires that "[a]ppointments and promotions of teachers, principals, and other educational employees [in the Chicago public school system] shall be made for merit only . . ."

See App. at 47. But the primary focus of the complaint was on the fact that petitioner had been denied a principal's *certificate*. The issuance of a certificate is not an entitlement to a job, but merely entitles the holder to *apply* for a job in the professional area covered by the certificate. *Webster v. Redmond*, 599 F.2d 793, 801 (1979), *cert. denied*, 444 U.S. 1039 (1980)

("There is thus no indication in Illinois law that possession of a certificate . . . means anything more than that one is to be placed on the eligibility list and considered at the appropriate time by the Board of Education."). The certification process and the hiring process are two separate actions. *Id.* ("[T]he Board of Education as a separate entity is to have the final word and power of [appointment or] promotion or denial over those candidates who have been certified to it by the Board of Examiners."). There is no justification for combining the two into a single act. *Id.* ("The statute states that [appointments and] promotions shall be made by the Board [of Education], and by no other.") Yet this is what the Court of Appeals has done.

Petitioner submits, therefore, that the Court of Appeals erred in making its determination that petitioner was not deprived of occupational liberty. Petitioner never said she was "seeking a promotion from public school teacher to principal" when she applied for a principal's certificate, as the Court of Appeals suggests, *Thomas*, No. 87-1086, slip op. at 2, App. at 2, and there is nothing in the

amended complaint from which such a motivation could be fairly inferred.

IV.

Certiorari Should Be Granted to Decide Questions of Mootness.

As stated earlier in this petition, see p. 8, the Board of Examiners was abolished by the Illinois General Assembly effective July 1, 1988, and is no longer authorized to conduct certification examinations for the Chicago public school system. As a result of this change in Illinois law, petitioner will never again be subjected to an unfair certification process at the hands of the Board of Examiners. Petitioner expects that the respondents here will seek dismissal of this petition on mootness grounds. But petitioner does not think the case is moot.

Section 34-8.1 of the Illinois School Code still requires prospective Chicago public school principals to "hold a valid supervisory or administrative certificate issued by the board of education in accordance with standards established by the general superintendent with the approval of the board of

education." *Compare* ILL. REV. STAT. ch. 122, para. 34-8.1 (1985) (App. at 33-34) *with* 1985 ILL. LAWS, P.A. 84-126, Section 34-8.1 (App. at 36-37). It is conceivable that, at some point in time, the Chicago Board of Education could decide to enforce that statute by establishing another in-house principal certification process similar to the one previously enforced by the Board of Examiners. Prospective Chicago public school principals would then be required to submit to two different certification systems—one administered by the state, one administered by the Chicago Board of Education—and successfully acquire two administrative certificates before he or she could apply for an administrative position in the Chicago public school system.

The chances of this happening appear to be fairly good. The entire Board of Examiners' staff was recently transferred to the Board of Education's personnel department and renamed the Bureau of Employee Eligibility. In this new role, it has established new examination procedures for prospective teachers which duplicate prior procedures, the only difference being that the Bureau of

Employee Eligibility does not issue teaching certificates. These new procedures were outlined in a Chicago Sun-Times newspaper article dated October 17, 1988.

According to the Sun-Times article, prospective Chicago public school teachers, who now are required to hold state certificates, are being subjected to additional written tests of basic skills as well as oral interviews conducted by the Bureau of Employee Eligibility before they may be considered for employment in the school system. Those who pass the additional tests are granted "regular" status in the school system, but those who cannot meet the extra requirements are limited to substitute teaching positions.

If the Chicago Board of Education is going to this much trouble to "screen" state-certified teachers, it is logical to expect that they will seek to enforce Section 34-8.1 at some point in time. And since there are no laws or court decisions to deter them, the Board is likely to re-institute the very same procedures complained of in the instant case. Written and oral examinations could be given, the oral committees will have the final say on who is

or is not certified, and there will be no right of appeal or other form of redress.

This Court's test for mootness centers on a determination whether the practices complained of are "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515, 36 S.Ct. 279, 55 L.Ed. 310, 316 (1911). Under this test, two elements are required to save a case from mootness: (1) the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there must be a reasonable expectation that the same complaining party would be subjected to the same action again. Petitioner believes the instant case meets this test.

First, the time frame for conducting a principal's certificate examination is quite short—less than a year from time of initial application to final decision. There is no way to get a case through the court system in that short period of time.

Second, it was about a year and a half between the time petitioner's original complaint was filed in the District Court in November, 1985 and the Board of Examiners'

expiration date of July 1, 1988. Even if petitioner had known from the beginning that the Board of Examiners was due to expire on a certain date, there was still not enough time to get a decision on her case before that date arrived. The briefs on petitioner's appeal to the Seventh Circuit Court of Appeals were not completed until April, 1987, and the Court of Appeals' decision was not handed down until September 12, 1988.

Third, it is now approximately eight months since the Board of Examiners' term of office expired, and this Court has yet to hear the case.

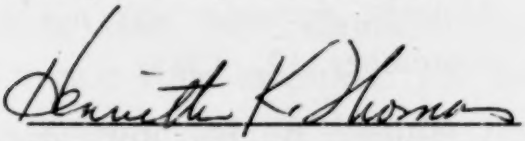
Finally, as stated above, petitioner has no reason to believe that the Chicago Board of Education will not enforce the provisions of Section 34-8.1 of the Illinois School Code by authorizing the Bureau of Employee Eligibility to conduct principal's certificate examinations.

So long as this remains a possibility, petitioner submits that the conduct complained of in the instant case is "capable of repetition, yet evading review," and the instant case is not moot.

CONCLUSION

For the reasons stated in this petition, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,



Henrietta K. Thomas, Pro Se

Dated this 28th day of February, 1989.

AFFIDAVIT OF SERVICE

Pursuant to Rule 28.5(c), Rules of the Supreme Court of the United States, Henrietta K. Thomas, being first duly sworn, deposes on oath and states that she served the foregoing PETITION FOR WRIT OF CERTIORARI and Appendix appended thereto on all parties required to be served by depositing three copies in the United States mail, with first-class postage prepaid, addressed as follows to counsel of record for the respondents:

Patricia J. Whitten, Attorney at Law
Chicago Board of Education
1819 West Pershing Road
Chicago, Illinois 60609

on Tuesday, February 28, 1989, at the United States Post Office, 211 South Clark Street, Chicago, Illinois 60604.

_____

Henrietta K. Thomas, Pro Se

Subscribed and Sworn to before me this 28th day of February, 1989.

_____

Notary Public